FILED
SEP 30 2002
CLERK

s. 01-10873 and 02-5034

IN THE SUPREME COURT OF THE UNITED STATES

KHANH PHUONG NGUYEN, PETITIONER

v.

UNITED STATES OF AMERICA

TUYET MAI THI PHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

MONICA S. ABRAMS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

10pp

QUESTION PRESENTED

Whether the court of appeals' unanimous affirmance of the petitioners' convictions should be set aside because of the participation of a single, non-Article III judge on the court of appeals' panel.

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-10873

KHANH PHUONG NGUYEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 02-5034

TUYET MAI THI PHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (No. 01-10873 Pet. App. 1-6) is reported at 284 F.3d 1086.[1]

---

[1] All citations to the petition appendix refer to the appendix filed in No. 01-10873, which is identical to the petition appendix filed in No. 02-5034.

JURISDICTION

The court of appeals entered its judgment on March 25, 2002. Neither petitioner filed a petition for rehearing. The petition for a writ of certiorari in No. 01-10873 was filed on May 29, 2002, and the petition for a writ of certiorari in No. 02-5034 was filed on June 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the District Court for the District of Guam, petitioners were convicted of conspiracy to import methamphetamine, in violation of 21 U.S.C. 952(a), importation of methamphetamine, in violation of 21 U.S.C. 960(B), and attempting to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(A). Both petitioners were sentenced to 212 months' imprisonment. The court of appeals affirmed.

1. In December 1999, a Guam Customs Office conducted a drug-detection canine sniff of 22 mail parcels at Guam's Main Postal Facility. Pet. App. 2; Gov't. C.A. Br. 4. The dog alerted to a package that was addressed to Linda Phan in Guam, and that contained a return address of Michael Tran, 12181 Candy Land, Garden Grove, California. Pet. App. 2-3. After obtaining a search warrant, the Customs Officer opened the package and found, among other things, five cylinders containing 443.8 grams of 97 percent pure d-Methamphetamine Hydrochloride. Id. at 2; Gov't C.A. Br. 6.

The Customs Service prepared the package for a controlled delivery by substituting rock salt for the methamphetamine. Pet. App. 2. The surface of each cylindrical object was sprayed with "clue spray," an invisible fluorescent powder that turns orange when illuminated with ultraviolet light. Id. at 3.

During the controlled delivery, petitioner Phan claimed the package at her local post office. After retrieving the package, Phan took a twenty-five minute, circuitous route home, even though the post office is located only one block from Phan's apartment. Pet. App. 3; Gov't C.A. Br. 9. After Phan entered the apartment, a breaching signal indicated to officers that the package had been opened. The officers entered the apartment and found both petitioners in the living room, surrounded by parts of the opened package. Two of the cylinders were in the toilet and three were in the bathtub. Pet. App. 3. The officers spotted orange clue spray on petitioner Nguyen's hand and dress. After obtaining search warrants, the officers recovered from petitioner Nguyen's apartment drug paraphernalia and a small amount of methamphetamine. Ibid.; Gov't C.A. Br. 12. Officers later learned that California police had interviewed Nguyen's brother, who is also Phan's nephew, on an unrelated matter. Pet. App. 3. When asked for identification, he presented a falsified California driver's license bearing the same address as that appearing on the return label of the Guam package. Ibid.

2. A grand jury indicted petitioners on charges of (1) conspiring to import methamphetamine, in violation of 21 U.S.C. 952(a), (2) knowingly aiding and abetting in the importation of more than fifty grams of methamphetamine, in violation of 18 U.S.C. 960, and (3) attempting to possess with intent to distribute more than fifty grams of methamphetamine, in violation of 21 U.S.C. 841. A jury found both petitioners guilty on all counts. Pet. App. 4. The district court sentenced both petitioners to 212 months' imprisonment. Ibid.

3. The court of appeals unanimously affirmed. Pet. App. 1-6. The court of appeals panel consisted of Chief Judge Schroeder, Judge Goodwin, and, sitting by designation, Chief Judge Munson of the District of the Northern Mariana Islands.

ARGUMENT

Petitioners contend (01-10873 Pet. 4-6; 02-5034 Pet. 4-5) that this Court should grant certiorari "in an exercise of this Court's supervisory powers" because the court of appeals' judgment "was vitiated by the participation of the judge for the District Court for the Northern Mariana Islands," a non-Article III judge. This Court's review is not warranted for four reasons.

First, petitioners raise this issue for the first time in their petitions for certiorari. Petitioners did not object to the composition of the court of appeals' panel before, during, or after

oral argument.[2] Nor did either petitioner seek rehearing or rehearing en banc based on the panel's inclusion of a single non-Article III judge. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." United States v. Williams, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); see also Posters 'N' Things v. United States, 511 U.S. 513, 527 (1994).

Second, by failing to object to the composition of the panel before the court of appeals, petitioners waived their right, if any, to a panel composed entirely of Article III judges. Cf. Peretz v. United States, 501 U.S. 923, 936-937 (1991) ("The Constitution affords no protection to a defendant * * * who fails to demand the presence of an Article III judge at the selection of his jury"); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848-849 (1986) ("as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver").

Third, petitioners identify no conflict in the circuits on the question presented. Nor are we aware of any. The only other Circuit that includes territorial district judges within its

---

[2] Oral argument was heard in petitioner Nguyen's appeal. Petitioner Phan waived oral argument five days before the scheduled argument date. Because the Ninth Circuit reveals the composition of appellate panels one week before oral argument, Phan either knew or could have known the composition of her panel at the time she waived oral argument.

jurisdiction is the Third Circuit, which has not yet, to our knowledge, had territorial judges sit on appellate panels.

Fourth, even if petitioners' claim has not been waived, this Court could review their claim only for plain error because they did not object below. Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725 (1993). No plain error occurred.

In the first place, it is debatable whether the separation of powers principles embodied in Article III apply to the residents of United States territories. See United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) ("Only 'fundamental' constitutional rights are guaranteed to inhabitants of * * * [the unincorporated] territories."); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64-65 (1982) (noting territorial exception to Article III); Glidden Co. v. Zdanok, 370 U.S. 530, 544 (1962) (plurality opinion) ("in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies") (footnote omitted).

In any event, this Court has long held that the "de facto officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or

election to office is deficient." Ryder v. United States, 515 U.S. 177, 180 (1995). In Ryder, this Court declined to apply the de facto officer doctrine to a claim that two of the judges serving on the Coast Guard Court of Military Review were appointed in violation of the Appointments Clause of Article II of the Constitution. The Court explained that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question." Id. at 182. But the Court noted that prior cases had applied the de facto officer doctrine where the objection had not been timely raised before the tribunal at issue and the objection did not rest on the Constitution. Id. at 182. Here, in contrast to Ryder, petitioners belatedly challenge the participation of one judge on the appellate panel, without having pressed their arguments before the challenged tribunal. Petitioners, moreover, appear to make no constitutional challenge to the participation of the non-Article III judge, but instead argue that "[n]o statute authorizes the designation or assignment of a non-Article III judge." 01-10873 Pet. 4, 02-5034 Pet. 4-5. Such statutory claims are subject to application of the de facto officer doctrine. McDowell v. United States, 159 U.S. 596, 598 (1895).

Finally, any error could not have affected petitioners' substantial rights. Cf. Ryder, 515 U.S. at 186 (declining to reach

"whether the alleged defects in the composition of petitioner's appellate panel are susceptible to harmless-error review"). Petitioners' appeal was heard and decided by two Article III judges, who both agreed that petitioners' challenges to the district court's evidentiary rulings and the sufficiency of the evidence were meritless. "A majority of the number of judges thus authorized to constitute the court was present, heard oral argument, and participated in the decision, as provided in 28 U.S.C. § 46(c) and (d)." Tobin v. Ramey, 206 F.2d 505, 506 (5th Cir. 1953), cert. denied, 346 U.S. 925 (1954). See also Murray v. National Broadcasting Co., 35 F.3d 45, 46-47 (2d Cir. 1994) (holding that 28 U.S.C. 46(b) "was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate"), cert. denied, 513 U.S. 1082 (1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

MONICA S. ABRAMS
Attorney

SEPTEMBER 2002